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IN THE

Supreme Court of the United States

SEUNG CHUN LIM, FLUFFY, INC., a California corporation, and 5436 SANTA MONICA BOULEVARD, INC., a California corporation,

Cross-Petitioners,

v.

CITY OF LONG BEACH,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT E. SHANNON*
City Attorney
DANIEL S. MURPHY
Principal Deputy City Attorney
333 West Ocean Boulevard
Long Beach, California 90802
(562) 570-2200

* *Counsel of Record*

Attorneys for Cross-Respondent

164668

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Denying Certiorari	5
A. Question No. 1: A City May Adopt An Adult Zoning Ordinance That Compels Existing Adult Businesses To Relocate.	5
B. Question No. 2: Adult Businesses Should Bear The Burden Of Proof.	5
C. Question No. 3: Properties Encumbered By Restrictive Leases Banning Adult Entertainment Should Be Considered Part Of The Actual Real Estate Market.	7
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

BBI Enterprises, Inc. v. City of Chicago, 874 F. Supp. 890 (N.D. Ill. 1995) 6

City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) 5, 7, 8, 9

SDJ, Inc. v. City of Houston, 636 F. Supp. 1359 (S.D. Tex. 1986), *aff'd*, 837 F.2d 1268 (5th Cir. 1988) 6

T-Marc, Inc. v. Pinellas County, 804 F. Supp. 1500 (M.D. Fla. 1992) 6

3750 East Foothill Blvd., Inc. v. City of Pasadena, 912 F. Supp. 1257 (C.D. Cal. 1995), *aff'd*, 99 F.3d 1147 (9th Cir. 1996) 8

Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993) 2, 3, 9

Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995) 5, 8

Statutes:

LBMC Section 21.15.110 1

LBMC Section 21.27.150 1

LBMC Section 21.45.110(A)(1) 2

STATEMENT OF THE CASE

This action involves a challenge to the City of Long Beach's adult entertainment ordinance by the owners of three adult book stores and the owner of an adult bookstore/ mini-theater, on the grounds that such ordinance is unconstitutional.

Although this action arises from the recent expiration of the City's amortization period for non-conforming adult entertainment businesses, the City has had a long history of regulation of such uses. In 1977, the City of Long Beach adopted an adult entertainment ordinance, which made certain adult businesses located near each other or near residential districts, churches or schools non-conforming uses. "Adult entertainment businesses" are defined in Long Beach Municipal Code ("LBMC") Section 21.15.110. This ordinance was adopted upon the receipt of testimony regarding the deleterious effect of these uses in such locations and in concentrated areas.

In 1988, eleven years after the adoption of the ordinance, the City undertook a review in order to determine how successful its adult entertainment ordinance had been in eliminating such uses from the specified undesirable areas. The City of Long Beach found that its 1977 adult entertainment ordinance had little effect, and the City Council adopted LBMC Section 21.27.150, which required all the existing nonconforming adult entertainment businesses to comply with the locational requirements within two years. The ordinance provided that if certain conditions were met, the owners of such businesses could obtain a three year extension to the amortization period ending on August 1, 1993.

After the United States Court of Appeals for the Ninth Circuit ruling in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), the City of Long Beach revisited its adult entertainment ordinance. On August 18, 1994 and September 1, 1994, the City's Planning Commission held hearings on several proposed amendments to the adult entertainment ordinance, and planning commission staff prepared reports for these hearings. The purpose of these amendments was to reduce the size of several of the buffer zones, thereby making the locational requirements for adult businesses less restrictive. On September 20, 1994, and October 11, 1994, the Planning Commission filed reports with the City Council recommending modifications of the buffer zones for adult businesses. On October 18, 1994, the City Council adopted Ordinance C-7274 (the "1994 Ordinance").

The 1994 Ordinance modified, among other things, the adult entertainment buffer zones and established an eighteen month amortization period (through May 18, 1996) for existing nonconforming businesses to comply with the less restrictive locational requirements.

Under *Long Beach Municipal Code*, Section 21.45.110(A)(1), as amended in 1994, an adult entertainment business may not be located: (1) within 300 feet of a residential zoning district or residential planned development district within the City (specifically excluding mixed-use zones); (2) within 1,000 feet of any public or private school (kindergarten through twelfth grade) located within the City; (3) within 600 feet of any City park; (4) within 500 feet of a church; (5) within 1,000 feet of any other adult entertainment business.

None of the plaintiffs have made any legitimate effort to relocate their adult entertainment businesses prior to or after the filing of this lawsuit. Robert Blake, the president of Fluffy, Inc., testified that he has not attempted to relocate because the City of Long Beach "hasn't proven to [him] that [he has to]." Larry Sphar, principal officer of 5436 Santa Monica Boulevard, Inc., allegedly contacted realtors and potential lessors. Mr. Sphar considered purchasing a building on Cherry Avenue, near the 405 freeway, but because the seller wanted $1.3 million dollars for the building, Mr. Sphar felt that this purchase would not be "a good, ethical business decision.

The City of Long Beach identified 115 potentially available alternative sites for adult entertainment establishments, and the District Court found 109 of these sights to meet the criteria set forth under *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532 (9th Cir. 1993) and that at least twenty-seven or twenty-eight adult businesses could co-exist under the City of Long Beach's 1994 ordinance. These locations do not constitute the total market for alternative sites that could be potentially used for adult business establishments. The City of Long Beach did not attempt to identify every possible alternative location due to the cost of such a survey. The sites identified by the City of Long Beach represent an attempt by the City of Long Beach to show the existence of sufficient alternative locations available to plaintiffs and other adult businesses. Plaintiff's conceded during trial that eight sites were available for plaintiffs to relocate, and seven of these sites are more than 1,000 feet from each other.

Plaintiffs appealed, contending among other things that the district court erred in placing the burden of proof on the

adult business owners and that the district court erred in considering sites encumbered by long-term leases to be part of the relevant real estate market.

On June 27, 2000, the Ninth Circuit issued an opinion in which it ruled that the City of Long Beach had the burden of proving that adult businesses had a reasonable opportunity to open and operate within the City. The Ninth Circuit also ruled that this action should be remanded to permit plaintiffs' adult businesses the opportunity to present evidence that properties proffered by the City of Long Beach were not reasonably available because they were encumbered by long-term leases.

Two of plaintiffs' adult businesses are located on Pacific Coast Highway between Hayes and Termino Avenue, where there has been an on going problem with prostitution and lewd activities, and plaintiffs' adult entertainment businesses are clearly contributing to these illegal activities. In addition, one of plaintiffs' adult businesses is a problem with over fifty (50) arrests for lewd conduct occurring in or around plaintiff's building in a two year period. Mr. Sphar, the operator of this establishment, acknowledged that he was aware of these arrests, but did not see this as a problem because he did not consider these arrest to be "legitimate."

Plaintiffs have been allowed, under order of the Federal Court, to continue to operate in close proximity to residential neighborhoods without restriction. Plaintiffs' adult businesses have had and continue to have a deleterious effect on residents and neighborhoods in the City of Long Beach.

REASONS FOR DENYING CERTIORARI

A. QUESTION NO. 1: A CITY MAY ADOPT AN ADULT ZONING ORDINANCE THAT COMPELS EXISTING ADULT BUSINESSES TO RELOCATE.

The City of Long Beach's Ordinance does not ban adult businesses outright but simply limits the areas of the city in which they may operate. Because zoning laws such as the ordinance at issue target the secondary effects of adult businesses, rather than the content of the speech involved, they are considered content-neutral time, place, and manner restrictions and are constitutionally permissible so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. (*City of Renton v. Playtime Theatres*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).) Plaintiffs do not dispute that curbing the secondary effects of adult businesses, such as neighborhood deterioration, crime, and decreased property values, is a substantial government interest.

B. QUESTION NO. 2: ADULT BUSINESSES SHOULD BEAR THE BURDEN OF PROOF.

In *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995), the Fifth Circuit Court of Appeals addressed the issue of who has the burden of proof, and the court ruled that it was the plaintiff adult business owner who has the burden of proof. The court stated as follows:

> The Adult Businesses had the burden of proving that the Ordinances denied them a reasonable opportunity to open and operate their businesses

> by failing to provide reasonable alternative avenues of communication. To meet their burden, the Adult Businesses had to show that the areas left open to them were inadequate to satisfy the demand for adult business locations. *Id.* at 1126.

In *BBI Enterprises, Inc. v. City of Chicago*, 874 F. Supp. 890 (N.D. Ill. 1995), the district court ruled that plaintiff BBI had the burden of proving its constitutional challenge. In pointing out that both parties' proofs had deficiencies, the district court stated "where as here neither side has supplied entirely reliable information, the party having the burden of persuasion — here BBI — must suffer the consequences of such uncertainty." (*Id.* at 895.)

In *T-Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500 (M.D. Fla. 1992), the district court held that the law does not require defendants to confirm that the sites are economically and logistically viable, except as it relates in terms of the ordinance. (*Id.* at 1504.) The *T-Marc* court had determined that the County had met its burden of complying with the ordinance "by presenting evidence that 123 alternative sites complied with the distance restriction in the ordinance." (*Id.* at 1504, following *SDJ, Inc. v. City of Houston*, 636 F. Supp. 1359, 1370 (S.D. Tex. 1986), *aff'd*, 837 F.2d 1268 (5th Cir. 1988).)

In the present case, defendant City of Long Beach has come forward with a significant number of sites. Plaintiffs, however, find these sites to be unsatisfactory for a variety of reasons (i.e. the site is to large, the site is to small, the site will have to be remodeled, the site may be occupied, the site is too expensive, etc.) There is no evidence that plaintiffs

have been unable to relocate. In fact, the plaintiffs have made little attempt to find a location that met the required buffers. Mr. Blake of South Seas Adult Bookstore acknowledged that he did not make any attempt to relocate. Mr. Sphar testified that he found a location, but deemed this cite to be too expensive to buy.

As set forth in the City of Long Beach's Petition for Writ of Certiorari, the plaintiff adult businesses should have the burden of not only showing that particular sites would not reasonably become available, but should also have the burden of proving that the City of Long Beach's Adult Zoning Ordinance denied them a reasonable opportunity to open and operate their businesses by failing to provide reasonable alternative avenues of communication.

C. QUESTION NO. 3: PROPERTIES ENCUMBERED BY RESTRICTIVE LEASES BANNING ADULT ENTERTAINMENT SHOULD BE CONSIDERED PART OF THE ACTUAL REAL ESTATE MARKET.

In *City of Renton v. Playtime Theatres*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), respondents, adult business operators, argued that the locational requirements of the city's ordinance resulted in a substantial restriction of their first amendment right of speech because almost all of the land in question "is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and that in general there are no 'commercially viable' adult theater sites within the 520 acres left open by the *Renton* ordinance." (*Id.* 475 U.S. at 53). The United States Supreme Court explained that the Ninth Circuit

had erred in accepting plaintiffs' argument and stated the following:

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. *Id.* 475 U.S. at 54.

Following *Renton*, the Fifth Circuit found it "patently irrelevant" that certain sites were unavailable either because the owner of the site would not rent or sell to an adult business or because the site is currently occupied. (*Woodall v. City of El Paso*, 49 F.3d 1120, 1125-26 (5th Cir. 1995).) The *Woodall* Court concluded that neither of these facts was "of any obvious concern under *Renton*." (*Id.*)

In discussing the "ground rules" for determining whether adequate alternative sites exist for adult businesses, District Court Judge Collins of the Central District of California determined that it was "not particularly relevant" under *Renton* that almost none of the developed land was for sale or lease and that commercially viable sites were lacking. (*3750 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1257, 1264 (C.D. Cal. 1995), *aff'd*, 99 F.3d 1147 (9th Cir. 1996) ("*3570 East Foothill I*").

Properties with a restrictive lease banning adult businesses are considered "potentially available" because the United States Supreme Court has declined to carve out

special rules for adult businesses competing in the real estate market. *See Renton, supra*, 457 U.S. at 53; *Topanga, supra*, 989 F.2d at 1531-32 ("The issue is whether any site is part of an actual market for commercial enterprises generally . . . The City is correct that at times Mr. Bailey improperly considered factors such as . . . whether adult businesses would not be welcomed by landlords.")

As set forth in the City of Long Beach Petition for a Writ of Certiorari, sites encumbered by long term leases and sites encumbered by restrictive leases banning adult entertainment should be considered part of the actual business real estate market. An operator of an adult business may, like any other business, purchase the property in question, renegotiate or buy-out a long term lease, or negotiate to sublease the property that is subject to a long term lease.

CONCLUSION

For the foregoing reasons, Cross-Respondent City of Long Beach respectfully requests that this Honorable Court deny certiorari.

Respectfully submitted,

ROBERT E. SHANNON*
City Attorney
DANIEL S. MURPHY
Principal Deputy City Attorney
333 West Ocean Boulevard
Long Beach, California 90802
(562) 570-2200

Attorneys for Cross-Respondent

* *Counsel of Record*